Supreme Court, U.S.
FILED
SEP 17 1996
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(19)

Nos. 95-9515 and 95-9575

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF KANSAS,
Petitioner and
Cross Respondent,

v.

LEROY HENDRICKS,
Respondent and
Cross Petitioner.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

In 1994 the Kansas Legislature passed the Sexually Violent Predator Act (SVP Act). The Act is aimed at providing a means to keep sex offenders who are perceived to be dangerous incarcerated after the expiration of their prison terms. Unlike other sex offender commitment schemes, the SVP Act does not provide a dispositional alternative to traditional prosecution and sentencing. Instead it provides for the institution of the commitment proceeding only after the offender is about to be released from incarceration.

In 1984, Mr. Hendricks entered into a plea agreement with the State of Kansas providing that he be sentenced to a term of 5 to 20 years incarceration for two counts of taking indecent liberties with a child for fondling two thirteen year old boys who came into the electronics store where he worked. A third count arising out of the same incident was dismissed. The State did not request consecutive sentences or enhanced sentences.[1] The State did not request evaluation or treatment of Mr. Hendricks at a state psychiatric facility. Pet. App. 3a.[2]

Mr. Hendricks served his sentence without incident. He earned all possible good time and was scheduled to be released on September 11, 1994. J.A. 5. Upon his release, he would have been under supervision requiring him to live in a halfway house and receive group and individual counseling. J.A. 183, 186.

The Sexually Violent Predator Act

In response to the rape and murder of a young woman named Stephanie Schmidt by Donald Ray Gideon, a co-

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[1] Under the sentencing laws in effect at the time Mr. Hendricks committed his crimes, he could have been sentenced to a term of 45 to 180 years. He would have first been eligible for parole upon reaching age 73 in 2007. The law would not have required his release, if he earned all possible good time, until 2074.

[2] A more complete statement of the case is set forth in the Cross Petitioner's Brief. That statement is adopted by reference.

worker who had recently been released on parole from a sentence for rape, an *ad hoc* task force was formed by the victim's family and others to lobby for passage of the SVP Act. Pet. App. 25a. The Act, similar to legislation first passed in 1990 in Washington, provides for a "civil commitment" of persons who according to the legislative "findings" comprise a "small but extremely dangerous group" of "predators" who do not have a mental defect or disease that renders them appropriate for treatment under the existing involuntary treatment statutes. K.S.A. 59-29a01.

The SVP Act applies to persons prosecuted for any sex offense, except consensual sodomy, and any other crime which is alleged to be sexually motivated, who are convicted and sentenced, found not guilty by reason of insanity after proof that the person committed the offense, or found incompetent to stand trial and later proved to have committed the charged offense beyond a reasonable doubt at a special hearing. K.S.A. 59-29a03. Members of the group are found to have "antisocial personality features which are unamenable to existing mental illness treatment modalities" and are likely to engage in future acts of sexual violence. Further, the prognosis for treatment of these individuals is "poor" and the treatment needs are "very long term". Pet. App. 60a, K.S.A. 59-29a01.

The SVP Act defines "sexually violent predator" as:

> "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Pet. App. 60a, K.S.A. 59-29a02 (a).

The SVP Act defines "mental abnormality" as:

> "any congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Pet. App. 60a, K.S.A. 59-29a02(b).

The SVP Act commitment provisions apply only to those about to be released from total confinement. While in most cases it will apply to persons being released from prison sentences which is the case before the Court, it also can be used to extend the confinement of a person found not guilty by reason of insanity who is no longer insane but is perceived to be dangerous. K.S.A. 59-29a03. The prosecuting attorney (now the Attorney General) is notified of the pending release and determines whether a petition should be filed shortly before the person's release. K.S.A. 59-29a04. After the filing, a probable cause finding is required followed by a trial. Either party or the judge may request a jury trial. The Act generally provides for procedural safeguards paralleling a criminal trial. K.S.A. 59-29a05, 29a06.

If the person is found to be a sexually violent predator, the court must order commitment to the custody of the Secretary of Social and Rehabilitation Services (SRS). SRS, in turn, is empowered to enter into a contract with the Department of Corrections (DOC) to provide a facility. The person is segregated from mentally ill persons and is not provided the specific guarantees of rights or privileges of mentally ill committees. K.S.A. 59-29a07.

The Commitment Proceedings

On August 17, 1994, the same prosecutor's office that had entered into a plea agreement with Mr. Hendricks in 1984 filed a petition to have him committed as a sexually violent predator. J.A. 4. At the probable cause hearing held two days later, the State relied on the testimony of Dan Crask, a licensed specialist clinical social worker who had never spoken to Mr. Hendricks. In his testimony, which was based on a review of ten year old reports, he

opined that Mr. Hendricks had pedophilia and that people with pedophilia may stop their behavior occasionally after incarceration, but tend to repeat that behavior over time. J.A. 24-26. He further testified that pedophilia is not a personality disorder. He could not give the court a definition of "mental abnormality." J.A. 28. Mr. Hendricks moved for dismissal of the petition on the grounds that the procedure violated constitutional provisions including *ex post facto,* double jeopardy, substantive due process and equal protection. J.A. 32-35. The court deferred ruling on the motion. J.A. 36-43.

At the commitment trial, the State began its evidence by calling Mr. Hendricks to testify.[3] He outlined his family background. J.A. 126-130, as well as his previous sexual offenses against children. J.A. 130-172. He stated that during his latest incarceration he had received no treatment for any sexual disorder.[4] He stated that he had not had any urge to have sexual contact with children since 1985, and he was aware that if he re-offended, he would spend the rest of his life in prison. J.A. 187. He acknowledged however, that he was a "pedophile" and while he hoped that he would not re-offend, the only way he could "guarantee" that he never would was to die. J.A. 190.

Dr. Charles Befort, the chief psychologist at Larned Security Hospital, testifying for the State, maintained that Mr. Hendricks was neither mentally ill nor suffering from a personality disorder. J.A. 256-257.[5] He also stated

[3] As a consequence of its ruling that the commitment proceeding was "civil" the district court concluded that Mr. Hendricks had no privilege against self incrimination. J.A. 42.

[4] Mr. Hendricks testified that he had been offered treatment in prison but he had not enrolled in it. He said his reasons included a desire to work, which would not have been possible in treatment, and that he had been told, "There is no cure for your type." J.A. 143, 235.

[5] There is no limitation in Dr. Befort's testimony, as alleged by the State, that the lack of mental illness is "within the meaning of the traditional Kansas civil commitment statute" rather than a more generally accepted definition of the psychological profession.

that the statutory definition of the term "mental abnormality" was circular, in that the behavior was used both to identify the conditon and to predict future behavior. J.A. 263-264. Dr. Befort labeled Mr. Hendricks as a pedophile and stated that, in his interpretation of the statute, pedophilia was a "mental abnormality." He also acknowledged that his interpretation was open to debate. J.A. 271-272. He further opined that Mr. Hendricks would engage either in acts of sexual violence or sex acts with children if permitted to do so, based in large part on his belief that behavior is a good predictor of behavior. J.A. 247-248. He interpreted the term "likely" in the SVP Act to mean more probable than not. J.A. 260-261, 279. Dr. Befort never hazarded a guess about when in the future Mr. Hendricks' sexual conduct might occur.

Mr. Hendricks presented testimony from a forensic psychiatrist, Dr. William Logan, that in making predictions regarding long term future dangerousness, psychiatrists were wrong two thirds of the time. Dr. Logan further testified that studies of recidivism of pedophiles showed an average re-offense rate following treatment of 15% and an average re-offense rate without treatment of 17%. J.A. 328-329. Dr. Logan opined that based upon a reasonable degree of medical probability or certainty a mental health professional cannot predict whether an individual is more likely than not to engage in future acts of sexual predation. J.A. 331.

Mr. Hendricks was found to be a sexually violent predator and committed to Larned State Security Hospital even though no contractor had been retained to provide treatment nor had any new staff been added to provide treatment to SVP Act committees. J.A. 366-372. Even though the staff at that facility, did not have the equipment, training or expertise to provide treatment, J.A. 483, 484, 552, the district court found that SRS had established a treat-

ment program *available perhaps at some time in the future*. J.A. 387 (emphasis added).

That point in the future had not yet arrived when Dr. Befort, now Acting Clinical Director of the Sexual Predator Treatment Program, testified ten months later in a state *habeas corpus* hearing. Echoing the claims of SRS officials before him that treatment was at hand,[6] Dr. Befort testified that the sexual predator treatment program had "plenty of funding and lots of space" J.A. 395, and that it was "about ready to start up full steam." J.A. 413. When brought back to a description of what was actually provided, Dr. Befort told the court that Mr. Hendricks and other persons committed under the SVP Act were receiving "essentially no treatment." J.A. 393. He elaborated by stating that even though he was the Acting Clinical Director, he did not feel he was fully qualified to be in that position. J.A. 392. He further testified that there were no clinical staff giving treatment to SVP Act committees except for himself. J.A. 392. He said he could not give effective treatment to Mr. Hendricks, or the other committees, because he was the person whose testimony had resulted in their involuntary commitment. J.A. 396-397. Dr. Befort also testified that on the sporadic occasions when a group session was held, they were primarily gripe sessions about the lack of treatment and did not address sexual deviancy issues. J.A. 398-399.

Dr. Befort did state that the committees were receiving "ward milieu" therapy.[7] He said "ward milieu means that the environment, the atmosphere, what goes on in terms

[6] In testimony at a pretrial hearing, the SRS official in charge of setting up the treatment program testified that a contract for a treatment provider, if not already signed, would be signed in the very near future. J.A. 62-63. Some thirty days later, at a post trial hearing, another SRS official testified that no contract had been awarded but that treatment would be provided by SRS staff. J.A. 367.

[7] *Cf. O'Connor v. Donaldson*, 422 U.S. 563 (1975).

of interpersonal interaction is of hopefully a therapeutic or positive effect on the residents or patients. . . ." J.A. 407. He went on to state that by itself, "ward milieu" treatment is totally inadequate. J.A. 417. Dr. Befort concluded his testimony by telling the court, "In terms of needed treatment relevant to the sexual deviancy, that hasn't been delivered yet." J.A. 420. "Today it is still not available." J.A. 421. In the face of such evidence, the district court concluded that the allegation that *no treatment* was being provided to SVP Act committees was not true. J.A. 453, 454.

Decision of the Kansas Supreme Court

Respondent appealed the commitment. He argued that the Act, though labeled "civil" was punitive in purpose and effect and therefore violated the prohibition against double jeopardy and *ex post facto* laws. He also argued that he had been denied equal protection of the law because those committed under the SVP Act were subject to more onerous conditions, and greater difficulty of release, than persons committed under the State civil commitment laws. Respondent further asserted that the Act, by requiring indefinite incarceration of persons without a finding of both dangerousness and mental illness, violated substantive due process. Pet. App. 10a. The Kansas Supreme Court agreed that the Act violated substantive due process.[8]

[8] The State persists in labeling the majority opinion of the Kansas Supreme Court a plurality opinion. Justice Lockett, the member of the majority who wrote the joining concurrence, states very plainly, "In this opinion, I will set out my reasoning for joining Justice Allegrucci's majority opinion." 912 P.2d at 138, Pet. App. 21a. Further, a portion of the paragraph from Justice Lockett's opinion being quoted by the State on page 15 of its brief is omitted. That portion left out by the State reads, ". . . I must join the majority." 912 P.2d at 140, Pet. App. 24a.

The Kansas Supreme Court first determined:

> It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent." The legislature concedes that sexually violent predators are not amenable to treatment under K.S.A. 59-2901 *et seq.* [The act for the care and treatment of mentally ill persons.] If there is nothing to treat under K.S.A. 59-2901, then there is no mental illness. *In re the Care and Treatment of Hendricks,* 259 Kan. 246, 912 P.2d 129, 136 (1996), Pet. App. 16a.

The Court explained:

> We must determine if Hendricks is denied substantive due process based not on his lack of character but, rather, on the merits of his challenge. Mental illness is defined by K.S.A. 59-2902(h) as meaning any person who (1) [is] suffering from a severe mental disorder to the extent that such person is in need of treatment; (2) lacks capacity to make an informed decision concerning treatment; and (3) is likely to cause harm to self or others. Here, neither the language of the Act nor the State's evidence supports a finding that 'mental abnormality or personality disorder' as used in 59-29a02(a), is a 'mental illness' as defined in 59-2902(h). Absent such a finding, the Act does not satisfy the constitutional standard set out in *Addington* and *Foucha.* Justice White, speaking for the majority of the United States Supreme Court in *Foucha,* clearly stated that to indefinitely confine as dangerous one who has a personality disorder or antisocial personality but is not mentally ill is constitutionally impermissible. 504 U.S. at 78. Similarly, to indefinitely confine as dangerous one who has a mental abnormality is constitutionally impermissible.

> In addition, the State's own evidence is that Hendricks was being committed even though he does not suffer from mental illness. Hendricks is not mentally ill, and the criminal offenses for which he was imprisoned were not the result of mental illness. Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of *Addington* and *Foucha,* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks' substantive due process rights. 912 P. 2d at 138, Pet. App. 20a.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment has been recognized by this Court to include substantive limitations on the states. If this were not true, a state government could deprive its citizens of fundamental constitutional rights for insubstantial reasons, so long as it provided a hearing for individual adjudication. But even the most elaborate hearing, with what appear to be abundant procedural protections, cannot be allowed to mask the unconstitutionality of laws and actions that exceed the power of government over people. Similarly, the substantive component of Due Process jurisprudence can act as a check on state government when it purports to be acting in a constitutionally permissible fashion but is actually attempting surrepitiously to accomplish a purpose that is forbidden by direct constitutional prohibitions.

The State of Kansas wished to continue to incapacitate Mr. Hendricks and other persons targeted by the SVP Act, even though its authority to do so had expired at the end of their criminal sentences, because it feared that they might be prospectively dangerous if released. As was demonstrated in our earlier brief as Cross Petitioner, Kansas lacked the authority to extend the criminal because of the combined effect of the *ex post facto* and Double Jeopardy Clauses of the Constitution. Kansas law already provided

a remedy—its civil commitment statute—that would allow it to seek the confinement and treatment of individuals upon a showing that they were mentally ill and dangerous to themselves or to others. But the State was not satisfied with this as a remedy, because it would have required it to demonstrate that persons like Mr. Hendricks had a mental illness, which it could not.

Faced with this dilemma, the State concocted a new statutory scheme that had some of the appearances and used some of the language of a civil commitment statute, but which lacked the central core of a constitutionally legitimate commitment law: a required finding of mental illness and the promise of attempts to treat the illness. In their place, the new scheme required only a showing of something it called "mental abnormality", the principal component of which was that the individual must be shown to be the kind of person who engages in the very kind of criminal behavior that he had been punished for prior to the expiration of his sentence. In other words, motivated by its politically driven desire to continue the punishment and incapacitation of persons like Mr. Hendricks, and regretting the level of punishment it had prescribed for their crimes before they were committed, the legislature constructed an elaborate ruse.

The constitutionality of this statutory scheme will be measured by the substantive limitations imposed by the Due Process Clause.

The threshold question is the level of scrutiny to be employed. This Court has made clear that heigthened, rather than deferential, scrutiny is warranted when a law deprives an individual of a fundamental liberty interest. And there can be no doubt that a law that incarcerates an individual deprives him of the fundamental right to physical freedom. Since the law is subject to the skeptical test of heightened scrutiny, the State must demonstrtate a compelling state interest, and must show that no less drastic means could accomplish that interest.

A key feature of heightened scrutiny is that the Court evaluates the actual purpose of the legislation, and not a hypothesized or *post hoc* rationalization.

This Court has made clear that a state may not confine an individual under the guise of civil commitment unless it demonstrates that he is both mentally ill and dangerous. The Kansas legislature attempted to evade that clear requirement by claiming that it was incarcerating those who exhibited "mental abnormality". This attempted deception is transparent, and the State's definition of "mental abnormality" reveals that it is a circular description of people who commit certain crimes. The Kansas Supreme Court has authoritatively and correctly interpreted the SVP Act as requiring no finding of mental illness.

It has been suggested to this Court that even a commitment statute that requires no finding of mental illness and no provision of treatment must be approved because some mental patients may have received no treatment (at least as we understand that concept today) in the eighteenth and early nineteenth centuries. It is certainly true that our nation's traditions and history have provided guidance to this Court in interpreting the meaning of Due Process. But the more expansive suggestion that the mere fact that a practice may have some antecedents in our history automatically requires its approval as constitutional today is inconsistent with important decisions of this Court, both within the mental health area and beyond.

Stripped of both its historical camouflage and the disingenuous claim that it is merely a therapeutic endeavor designed to treat a condition that is sort of equivalent to true mental illness, the SVP Act is revealed for what it really is: an impermissible attempt to continue punishment past the expiration of an inmate's criminal sentence. This is not permitted by the Constitution.

ARGUMENT

I. THE KANSAS STATUTE VIOLATES THE SUBSTANTIVE PROTECTIONS OF THE DUE PROCESS CLAUSE.

It is well settled that the Due Process Clause of the Fourteenth Amendment imposes substantive, as well as more familiar procedural, limitations on state actions that impair the liberty interests of individuals. This Court has repeatedly observed that this "substantive component . . . bars certain arbitrary, wrongful government actions 'regardless of the procedures used to implement them.'" *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). This substantive protection is not an empty formality that a state can satisfy by mere recitation of a governmental purpose that is not illegitimate or with a routine and formulaic insistence on deference to state policy choices. Rather, the core of substantive due process in this Court's modern jurisprudence is that some limitations on individual liberty are beyond the state's authority even if it purports to accompany them with procedural mechanisms that appear to allow fair adjudication. In other words, if the state seeks to restrict individual liberty for a purpose that is beyond its constitutional power, no procedures, however elaborate or generous they might appear, will permit the state to evade that substantive limitation.

Legitimate contemporary concerns about appropriate judicial restraint, reinforced by the memory of excesses in the implementation of the doctrine in an earlier era, have led this Court to ration its implementation of substantive due process. The Court has made clear that it will not casually supplant a state's policy preferences with its own, but has also indicated that it will be more demanding when a state seeks to deprive citizens of the most important liberty interests. By the same token, the substantive protections of the Due Process Clause would be drained of all significance if a state could extinguish fundamental

liberties of individuals without adequate justification or if a state were allowed to accomplish constitutionally impermissible goals through a ruse of pretending to exercise constitutionally valid powers.[9] In these limited circumstances, the Court must more vigorously and skeptically examine the state's actions and its proffered justification.

A. Heightened Scrutiny Of A State's Justification Is Warranted When One Of Its Laws Deprives Individuals Of Their Fundamental Right To Physical Freedom.

Both historically and conceptually, physical freedom has always been recognized as central to our understanding of what liberty means. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. at 80. Whatever else the drafters of the Due Process Clauses may have had in mind when they wrote the word "liberty," their contemplation surely included and, indeed, began with freedom from confinement. Reflecting this truism, this Court has taken great care not to "minimize the importance and fundamental nature of this right." *United States v. Salerno*, 481 U.S. 739, 750 (1987). "The institutionalization of an adult by the government triggers heightened, substan-

[9] In this case, the ruse may be further obfuscated by the appearance of procedural fairness. It is true that the procedural protections built into the Bail Reform Act, which weigh in the defendant's favor, were part of the Court's rationale in approving its system of pretrial detention in *United States v. Salerno*, 481 U.S. at 751. While on one side the SVP Act provides seemingly generous procedural protections, such as the allocation and magnitude of the burden of persuasion, on the other, it allows a prosecutor to force the respondent to take the stand and recount a history of decades old criminal behavior. Even without such a serious flaw, procedural protections will not save a statute that lacks a sufficient substantive rationale. The most elaborate procedures imaginable would be nothing more than a fig leaf if the state lacks the power to accomplish its substantive goal.

tive due process scrutiny," and the government interest justifying the deprivation of liberty must be "sufficiently compelling." *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring). Therefore, when a state chooses to strip an adult of this most basic of freedoms, this core constitutional value would be imperiled if the Court's methodology were to acquiesce in the law's constitutionality with a minimum of scrutiny or the kind of deference this Court traditionally employs when reviewing legislation that does not implicate fundamental rights. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

This Court has not fallen into that error. Instead, whenever a state's justification for depriving a citizen of physical liberty has been challenged, the Court has conducted its analysis through the lens traditionally described as heightened judicial scrutiny. In some of these cases, the Court has explicitly employed the language traditionally associated with "strict scrutiny." *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987); *Foucha v. Louisiana*, 504 U.S. 71 (1992). In other cases, the Court has not chosen to use these particular catchphrases, but has, by the character of its holdings and reasoning, clearly signaled that it was requiring of the state substantially more than a minimal justification for confining individuals against their will.

A good illustration of this latter category of cases is *O'Connor v. Donaldson*, 422 U.S. 563 (1975), which, like *Foucha* and the instant case, involved state civil commitment laws. In *Donaldson*, the Court rejected Florida's claim that it could involuntarily confine nondangerous mental patients in a state hospital. The rationales for such confinement that were emphatically rejected by the Court are instructive about the level of "scrutiny" or "deference" that is appropriate for such cases. The Court first rhetorically inquired whether a state could "confine the mentally ill merely to ensure them a living standard superior

to that they enjoy in the private community?" 422 U.S. at 575. Justice Stewart's opinion responded unequivocally: "That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution." *Id.* Thus the Court makes clear that providing help to the mentally ill is a legitimate state interest, but that the state cannot pursue that legitimate interest by depriving Ken Donaldson of his physical freedom. In a similarly rhetorical vein, the Court asked whether a state could "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different?" *Id.* The Court's response is equally categorical: "One might as well ask if the State, to avoid unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *Id.* Again, the rejected rationale is undoubtedly a legitimate state interest; states can implement the esthetic preferences of its citizens in such laws as zoning ordinances. *See generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). But such interests, while clearly legitimate, are just as clearly inadequate to justify the deprivation of an individual's right to physical liberty. The Court's approach in *Donaldson* reflects an intuitively obvious constitutional principle: taking away a person's physical freedom is constitutionally different in kind from providing care and assistance to willing recipients or restricting individual land use choices. The state must provide more than just a legitimate justification.[10]

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[10] This Court's opinion in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed") is not inconsistent with this conclusion. While the Court used language traditionally associated with the "rational basis" test in striking down the

The importance of this principle is not diminished by the state's claim that it is legislating in the area of mental health. It is true that this Court has cautioned that judges should not casually overturn legislation and administrative decisions in the area of mental disability. *See generally Jones v. United States*, 463 U.S. 354, 370 (1983). But it is equally true that the commitment of an individual to a mental institution involves a "massive curtailment of liberty", *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Vitek v. Jones*, 445 U.S. 480, 491 (1980), and that therefore the potential for state abuse of its authority is substantial. This Court has sought to balance these two concerns, on the one hand by avoiding judicial micromanagement of professional decisions, *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982),[11] and granting legislatures latitude to enact reasonable distinctions among classes of mental patients, *Jones v. United States, supra*, while on the other hand insisting that the state must have a purpose proportionate to the liberty loss it seeks to enact, *O'Connor v. Donaldson, supra*, and making sure that the state is not attempting to accomplish nontherapeutic purposes (such as incapacitation) under the guise of civil commitment, *Foucha v. Louisiana, supra*. By maintaining this balance, the Court has demonstrated that caution

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statute in question, the statute failed even this minimal test, and thus reference to more demanding scrutiny was unnecessary. This frequently quoted passage is therefore to be understood as an *a fortiori* statement.

By contrast, the Court did employ rational basis methodology to resolve the equal protection issue in *Heller v. Doe*, 509 U.S. 312, 319 (1993), but this was clearly because the issue of heightened scrutiny had not been argued below and therefore was not "properly" before this Court. *Id.*

[11] It is important to note that the *Youngberg* opinion's decision not to insist upon "compelling" state justification, 457 U.S. at 322, went only to the details of "those post-commitment interests cognizable as liberty interests under the Due Process Clause," 457 U.S. at 324. The case did not address the substantive justification for Nicholas Romeo's commitment under Pennsylvania law.

and prudence in addressing the ambiguities of mental disability are not inconsistent with rigorous enforcement of the substantive protections of liberty demanded by the Due Process Clause.[12]

B. The Kansas SVP Act Cannot Withstand Heightened Scrutiny.

Determining that a statute must be evaluated with heightened scrutiny does not, of course, end the constitutional inquiry.[13] The identification of this as the appropriate standard of review means, however, that the balancing of state and individual interests will proceed with a level of care reflective of the importance of the liberty interest at stake. Determining that an issue warrants heightened scrutiny, as contrasted to the deference exemplified by *Lee Optical*,[14] signals that there are substantial hurdles for a state to overcome in justifying its liberty deprivation.

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[12] Nor is there merit in Petitioner's professed concern that use of heightened scrutiny in cases involving deprivations of physical liberty would result in "chaos" in the review of "virtually all aspects of the States' criminal law and criminal justice systems, including the substance of state criminal offenses and the punishments authorized under statutes or sentencing guidelines." Pet. Br. at 25. This Court's opinions provide no basis for such anxiety. The Court has demonstrated no interest in interfering with ordinary sentencing practices through the employment of heightened scrutiny under the Due Process Clause. More significantly, the limitations on sentencing powers have traditionally been found in the Eighth Amendment's prohibition on cruel and unusual punishment, which has been interpreted to permit substantial flexibility in determining appropriate punishments. *See generally Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

[13] The Court has recently reminded us that even strict scrutiny involves a balancing of individual and governmental interests and need not be "fatal in fact." *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2117 (1995) (opinion of O'Connor, J.).

[14] In substantive due process cases, the Court appears not to have had occasion to employ the so-called middle tier of intermediate scrutiny that it has fashioned for some classifications in

Strict scrutiny analysis, which is also employed in some equal protection and First Amendment contexts, has three principal features that differentiate it from the ordinary rational basis inquiry that Petitioner has urged this Court to employ. First, the law must be in support of a compelling governmental interest. Second, the government must be unable to accomplish this purpose by means less restrictive of liberty than the law in question. The third feature that distinguishes heightened scrutiny from rationality review, and perhaps the most important for this case, is that the governmental purpose to be evaluated must be the state's actual reason for enacting the law. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 116 S.Ct. 2264, 2275 (1996) (characterizing intermediate scrutiny). *See also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (true purpose of antimiscegenation statute was "to maintain White Supremacy"); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (statute lacked secular purpose); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (racially discriminatory purpose inferred from pattern of enforcement);[15] *see generally* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 San Diego L. Rev. 953 (1978).

Applied to the facts of this case, this test would inquire whether Kansas had a compelling state interest in continuing to incarcerate Mr. Hendricks past the expiration of his sentence; whether that purpose could have been accomplished by less drastic means; and whether the real pur-

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equal protection analysis. *Cf. Craig v. Boren*, 429 U.S. 190 (1976); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). It does not appear that the differences between intermediate scrutiny and strict scrutiny would be relevant to this case.

[15] Sometimes even when the Court has not purported to impeach the state's announced purpose in a strict scrutiny case, it appears to have acted upon its skepticism through the enforcement of other requirements, such as the least drastic means test. *See Shelton v. Tucker*, 364 U.S. 479 (1960).

pose, to be evaluated in the other two prongs of the test, was, as the state asserts in this Court, to treat him for his "mental abnormality." Measured by these criteria, the Kansas SVP Act clearly violates the Due Process Clause.

1. *The State's legitimate interest in incapacitating Respondent expired when his criminal sentence expired.*

The State of Kansas had a legitimate interest in incarcerating Respondent in response to his criminal behavior. Under its power to punish crimes, it could justify this as a desire to rehabilitate Respondent, or as a retributive interest in exacting punishment, or a desire to incapacitate him from engaging in similar conduct in the future, or an amalgam of any or all of these reasons. The U.S. Constitution places few limits on the duration of incapacitation and punishment Kansas could have prescribed in its criminal statute for this type of conduct. *See Harmelin v. Michigan*, 501 U.S. 957 (1991). Even within the durational limits that the Kansas legislature had chosen to enact at the time of the offense, the State could have sought substantially longer incarceration. Instead of seeking conviction on all three counts, followed by a request for consecutive, enhanced sentences totaling 45 to 180 years, the State agreed to dismiss one count, to recommend an unenhanced sentence of 5 to 20 years on the remaining counts and to recommend that those sentences be served concurrently. Had the state sought longer incarceration as the prescribed penalty for Respondent's offenses, no constitutional issue would be presented. But the State chose not to do so, and Mr. Hendricks was incarcerated for the time prescribed in his sentence.

But Kansas has decided that, viewed in retrospect, the time prescribed in Mr. Hendricks' sentence was inadequate. In response, the legislature has prospectively enacted substantially longer sentences for those individuals

who commit such crimes in the future.[16] As discussed in our opening brief in this Court as Cross-Petitioner and in the *amicus curiae* brief of the National Association of Criminal Defense Lawyers (NACDL), the Constitution's prohibitions against *ex post facto* laws and double jeopardy prevented the state from openly extending Respondent's sentence.

Precluded from prolonging Respondent's incarceration directly, the State might have sought his confinement pursuant to its existing civil commitment laws. This Court has long held that the state has a constitutionally adequate justification for depriving an individual of his physical liberty if it commits him to receive treatment for a mental illness that renders him dangerous to himself or others. "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington v. Texas*, 441 U.S. 418, 426 (1979).

But the Kansas legislature concluded that this option was not feasible and would not accomplish its incapacitative purpose since it would require proof that the individual to be committed had a mental illness which it could then endeavor to treat. The statement of legislative purpose admitted that those to be confined under the SVP Act were individuals "who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the treatment act for mentally ill persons . . . ." K.S.A. 59-29a01. The legislature then explicitly contrasted the persons it intended to confine from mental patients under its mental health civil commitment laws, noting that the former "generally have antisocial personality features which are unamenable to existing illness treatment modalities and those features render them likely to engage in sexually violent behavior." *Id.*

[16] Following Mr. Hendricks conviction, Kansas changed from indeterminate sentencing to guideline based determinate sentencing. The same legislature that passed the SVP Act enacted substantially longer determinate sentences.

The new enactment under which Respondent is confined carefully avoids any requirement that the state demonstrate that the individual to be committed has a mental illness, and the legislature has acknowledged that the reason is that it wants to reach individuals who do not have a "mental disease or defect." In its place, the statute requires only a showing of either a "personality disorder" or a "mental abnormality." KSA 59-29a02(a). The legislative definition of "mental abnormality", which is not a term employed by clinicians to describe psychological pathologies, is particularly artful: " 'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KSA 59-29a02(b). A careful examination of this definition clearly reveals the legislature's purpose. The condition must either have been present from birth or have been acquired at some time subsequently. The motivation to commit the crimes can either be emotional (feeling like committing the crimes), or volitional (failing to prevent oneself from committing the crimes). The term "mental abnormality" itself connotes no further limitations: since very few people have the desire to commit these crimes, those who have such desires are by any linguistic construction "atypical" or "abnormal." Reduced to its essentials, the definition of "mental abnormality" means "individuals who like to commit these crimes, or who at least do not refrain from committing them." [17]

[17] Petitioner and *amici* Menninger Foundation, American Alliance for Rights Responsibilities, et al. warn that there is no definition of mental illness in the Constitution and that this Court should not

Neither pseudoclinical terminology nor after-invented rationalizations [18] can disguise the fact that the legislature enacted this statute not *despite* the fact that the affected individuals might not have a mental illness, but rather *because* they have no mental illness. The goal of the statute is not treatment of a mental condition, it is incapacitation. The facade of psychological-sounding language has been erected in an attempt to mask the constitutional impermissibility of the law's true purpose: extending incarceration beyond the expiration of the individual's sentence.

The Kansas Supreme Court has rendered an authoritative interpretation of the meaning of this statute. "We find no support in the Act that a finding of mental illness is required." *In re Care and Treatment of Hendricks*, 912 P.2d at 137, Pet. App. 18a. Not only is this finding binding on this Court under its own rules and precedents, *see, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992), but

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enshrine our current understanding of mental illness for all time. Similarly, there may be concern that Respondent's position would require the Court to read the contents of the American Psychiatric Association's DSM-IV as having constitutional proportions. But this case does not require the Court to determine the precise contours of which state definitions of mental illness would pass muster and which would not. All that is required in this case is a finding that when a state makes no requirement of mental illness, or attempts to disguise its lack of a mental illness requirement with mumbo-jumbo like "mental abnormality," it violates the restrictions announced in *Foucha*.

[18] *See, e.g.*, Brief of *Amici Curiae* Menninger Foundation, et al. *Amici* also seek to persuade this Court, citing references that are outside the Record of this case, that sexual psychopathy is now amenable to newly devised forms of treatment. *Amici* might have been better advised to attempt to persuade Kansas legislators of this optimistic approach to treatment, which the legislature clearly did not share, and which cannot be used now to buttress the statute's constitutionality as a *post hoc* rationale. *See United States v. Virginia*, 116 S.Ct. at 2275.

it is also logically compelled by the language in the text of the statute and by the history that led to its enactment.[19]

But it might be asked whether this elaborate ruse of pretending to require some "substitute" for mental illness was necessary. Why shouldn't the state be allowed to commit individuals it deems prospectively dangerous without any connection to mental illness? Why isn't it enough that the state's "interest in preventing crime . . . is both legitimate and compelling"? *United States v. Salerno*, 481 U.S. at 749. The simplest answer is that this issue was resolved by this Court in *Foucha*. One of the reasons given for rejecting Louisiana's scheme for committing insanity acquittees who were no longer mentally ill is that it would "be only a step away from substituting confinement for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness," 504 U.S. at 83, permits incarceration only of persons who are subject to criminal punishment. Indeed, one of the strongest reasons for the Court's rejection of Louisiana's proffered justification that dangerousness alone should suffice as a predicate for commitment is that "[t]he same would be true of any convicted criminal, even though he has completed his prision term." 504 U.S. at 82-83. This anticipates Respondent's situation with precision.[20]

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[19] The Kansas Supreme Court did not arrive at this interpretation casually. It began by noting that "we must presume the Act is constitutional and resolve all doubts in favor of the Act's validity. *If there is any way to construe the Act as constitutionally valid we must do so.*" 912 P.2d at 133, Pet. App. 10a (emphasis supplied). It could be argued that such a heavy presumption of constitutionality is inappropriate in strict scrutiny analysis, where the state is sometimes said to be required to overcome a presumption of invalidity. But the Kansas Supreme Court's statement of its approach and attitude clearly bespeak great care in considering whether an alternative interpretation of the legislative enactment might be possible.

[20] There are obvious differences between this Kansas statute and the Louisiana statute in *Foucha*, particularly with regard to the

But rejection of the notion of commitment on predictions of dangerousness alone does not depend solely on *stare decisis*. As several members of this Court have observed, divorcing the power to commit from any nexus to mental illness and treatment would invite the states to create an alternative system parallel to the criminal justice system that would lock people away on the basis of our fears of crimes they might someday commit. Such a shift away from the traditional requirements of our system of criminal justice is fraught with perils and potential for abuse, and should not be undertaken lightly.

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burden of persuasion. But at their core, the cases are really more similar than different. Each involves a legislature that seeks to civilly confine individuals who are not mentally ill because it cannot confine them under its ordinary criminal authority, in *Foucha* because they were acquitted, and in *Hendricks* because they were convicted, punished, and cannot be punished for the same offense again because of double jeopardy. Each statute is a ruse that attempts to accomplish what is in reality a punitive goal under the guise of civil commitment.

But there is also a substantial practical difference. Louisiana had relatively few options to protect its citizens from the future dangerousness of people like Terry Foucha: arguably, they could abolish the insanity defense, although there may be some doubt about whether that course of action would survive review under the state or Federal constitution. Short of that there is little they could do to incapacitate those whom it can never convict. By contrast, Kansas has an abundance of options: the legislature could enact longer sentences, they could enact indeterminate sentences in which eligibilty for release depends on persuading the parole board that inmates are not prospectively dangerous, etc. The one thing they cannot do is re-rig the rules of the game after the fact. To use a simple example that illustrates the limitations imposed by the double jeopardy clause, a state has the option of punishing a particular offense with a sentence of twenty years; but it cannot set the punishment at ten years and later decide that was not long enough, and therefore extend expiring sentences for another ten years. *See amicus curiae* brief of the National Association of Criminal Defense Lawyers.

2. Historical practices are not the sole determinant of the scope of the substantive meaning of the Due Process Clause.

It has been suggested to this Court that the constitutionality of committing people thought to be prospectively dangerous who are not mentally ill can be ratified without weighing the individual's interests against society's interests under strict scrutiny. The Menninger Foundation et al., in their *amici curiae* brief, recount in great detail their version of the history of preventive confinement, with particular emphasis on what they see as historical instances of custodial confinement without treatment, particularly in the colonial period and early nineteenth century. While the details of this history and the interpretations drawn by *amici* could be debated,[21] the more important point is that the argument misperceives the role of history in this Court's due process cases.

This Court has repeatedly discussed the relevance of historical practices and understanding to its interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments, but it has done so in contexts more limited and sharply focused than *amici* suggest. The first context in which the Court looks to history for guidance is to determine, under *procedural* due process, when a procedure

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[21] For example, the emphasis on the primitive practices and understanding of the colonial and very early national period is of questionable relevance. The focus on treatment of persons with chronic mental illness, while still far short of today's standards, had become more widely accepted by the time of the ratification of the Fourteenth Amendment. *See, e.g.*, Norman Dain, *Concepts of Insanity in the United States, 1789-1865* 194-95 (1964); Gerald N. Grob, *The Mad Among Us: A History of the Care of America's Mentally Ill* 109-16 (1994). When this Court looks to history for guidance in examining constitutional questions, it has emphasized the importance of taking care to focus on the relevant period in our history rather than broader generalizations. *See, e.g., Markman v. Westview Instruments, Inc.*, 116 S.Ct. 1384, 1390-95 (1996).

in a criminal trial violates due process if that procedure is not addressed by the more specific provisions of the Bill of Rights. This line of cases holds that since most procedural issues in criminal trials are governed by particular prohibitions of the first eight amendments, the more generally worded due process clause has a limited role to play in restricting the ability of states to dictate the shape of their criminal trials. First announced in *Patterson v. New York*, 432 U.S. 197, 202 (1977), the doctrine holds that procedural innovations by the states will be deemed presumptively valid unless they violate some principle "so rooted in the traditions and conscience of our people as to be ranked fundamental." *See also Medina v. California*, 505 U.S. 437, 445 (1992); *Montana v. Egelhoff*, 116 S.Ct. 2013, 2015 (1996) (plurality opinion); *Cooper v. Oklahoma*, 116 S.Ct. 1373, 1380 (1996) (finding an appropriate role both for historical antecedents and for contemporary evaluation of fairness). This resort to history is specifically driven by the presence of other criminal procedural protections in the Constitution, and thus has no particular relevance to the proper adjudication of cases under substantive due process.

The other principal use of history in this Court's due process jurisprudence does involve the substantive meaning of the clauses, but does so within a more restricted scope. As noted in section A, *supra*, an early step in strict scrutiny analysis under substantive due process is the determination of whether the right infringed is a "fundamental" liberty interest. Before deciding whether the right is fundamental, however, it is necessary to determine what the "right" is. There have been suggestions in some of this Court's opinions that the appropriate methodology is to craft the narrowest possible description of the liberty interest involved and then to decide whether that interest, so characterized, would have been deemed fundamental over the course of American history. *See, e.g., Michael H. v. Gerald D.*, 49 U.S. 110, 127-28 n.6 (1989) (plurality

opinion). Other members of the Court expressed discomfort with the narrowness of this historical inquiry because it coud imperil cases like *Loving v. Virginia*, 388 U.S. at 12, if the right were narrowly described as "the right to marry a person of another race" rather than "the right to select a marriage partner." *See Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part).

Similar anomalies could arise in this case if the historical inquiry were given too narrow and specific a focus. We believe that the appropriate formulation of the liberty interest is the right to be free from incarceration, and we believe that the Court was correct in using that formulation in determining the right to be fundamental in cases like *Salerno* and *Foucha*. The Menninger *amici* brief seems to suggest that the appropriate characterization is something like "the right not to be civilly confined as a sexual psychopath without effective treatment," and concludes that since instances of such confinement can be found in American history, the right cannot be deemed fundamental today, and therefore rational basis is the appropriate test in measuring the Act's modern constitutionality. If this were the appropriate line of analysis, states might be free to re-enact long discredited practices that would be insulated from careful judicial scrutiny solely because of their supposed historical pedigree. For example, the Menninger brief itself notes "the widespread acceptance of phrenology" at earlier times in our nation's history, Brief *Amici Curiae* of Menninger Foundation et al. at 10, and the early belief that "moral insanity" was separate and distinct from other forms of mental illness. *Id.* Surely any state that chose to re-enact a modernized version of any such notion today would not be protected from heightened judicial scrutiny by the practices' historical antecedents. If history were deemed to have that tight a stranglehold on this Court's implementation of the substantive protections of Due Process, *O'Connor v. Donaldson*, among other cases, would appear to be wrongly

decided on that ground alone. Such a narrow approach, requiring that a challenger demonstrate that a practice has been universally condemned throughout our history, cannot be reconciled with this Court's due process jurisprudence.

Without historical support for its provisions or anything other than a disingenuous claim that it is designed to treat a condition that is no more than a description of certain criminal acts that is sort of equivalent to a true mental illness, the SVP Act is revealed for what it really is: an impermissible attempt to extend punishment beyond the expiration of a person's criminal sentence. This is not permitted by the Constitution.

CONCLUSION

Mr. Hendricks requests that the Court affirm the judgment of the Kansas Supreme Court.

Respectfully submitted,

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